85-1440

No.

Supreme Court, U.S.
FILED
FEB 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1985

JOHNNIE C. SPRIGGINS and MARIA Y. SPRIGGINS,
Husband and Wife,

*Petitioners,*

v.

FIRST NATIONAL BANK OF LEA COUNTY
(A/K/A FIRST CITY NATIONAL BANK,
HOBBS, N.A., and MONCOR BANK, HOBBS, N.A.),

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTIONS FOR REVIEW

1. Must a judgment be set aside under Rule 60(b) of the Federal Rules of Civil Procedure where a party is coerced by his attorney into agreeing to the settlement?

2. Once an attorney withdraws as counsel, does his obligation to advocate his clients interests terminate even though the court does not approve the withdrawal?

3. Should a Rule 60(b) Motion have been granted where a party is abandoned by counsel in the midst of complex litigation?

4. Is Rule 60(b) to be liberally construed where a controversy has not been heard on the merits and traditional notions of fair play and substantial justice are frustrated?

## PARTIES

The caption contains all parties, except the respondent Bank was declared insolvent by the Comptroller of the Currency on August 30, 1985. The Federal Deposit Insurance Corporation is the receiver for Moncor Bank, Hobbs, N.A., but the corporation has not entered an appearance in this case.

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In The

# Supreme Court of the United States

October Term, 1985

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No. 85-

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JOHNNIE C. SPRIGGINS and MARIA Y. SPRIGGINS,
Husband and Wife,

*Petitioners,*

v.

FIRST NATIONAL BANK OF LEA COUNTY
(A/K/A FIRST CITY NATIONAL BANK,
HOBBS, N.A., and MONCOR BANK, HOBBS, N.A.),

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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### OPINIONS BELOW

1. Memorandum Opinion and Order, Civ. No. 82-0936, in the United States District Court for the District of New Mexico, May 15, 1984. (See Appendix.)

2. Order and Judgment, No. 84-1820, in the United States Court of Appeals for the Tenth Circuit, filed November 27,

1985. (See Appendix.)

3. Denial of Rehearing, No. 84-1820, in the United States Court of Appeals for the Tenth Circuit, filed December 6, 1985. (See Appendix.)

## STATEMENT OF GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals to be reviewed was filed on November 27, 1985. The Court denied rehearing on December 6, 1985. Jurisdiction is confirmed by reason of 28 U.S.C. Section 1254.

## RULE INVOLVED

### Rule 60(b) Federal Rules of Civil Procedure RELIEF FROM JUDGMENT OR ORDER

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, suprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken....

## STATEMENT OF THE CASE

J. C. Spriggins is a retired employee of the Hobbs New Mexico Public Schools. His wife is a domestic worker. Mr. Spriggins borrowed $70,000 in a series of loan transactions over a period of years from First National Bank of Lea

County (later called First City National Bank, Hobbs, N.A. and even later Moncor Bank, Hobbs, N.A.) In all of its forms, it is called "The Bank" here.

On July 14, 1981, after the bank had promised Spriggins new funds to construct an addition to his home, the bank backed out on its promise, and instead demanded that Spriggins consolidate his loans and enter into a new note. The new note increased his interest rate to 23%, imposed a $22,000 credit life and disability policy, and added a $10,000 savings account that was never established by the bank.

Though Spriggins had previously borrowed $70,000, the July 14, 1981 note had a principal balance of $106,394.48. The bank gave no truth in lending

disclosures and material documents in the transaction were forged by bank officers or were fraudulent documents.

Spriggins protested the note, but on November 2, 1981, a loan officer who was Vice President of the bank came to his home and demanded, in a rude and insolent manner, that Spriggins sign a new note replacing the July 14 document. This new note had a principal balance of $115,589.82. Spriggins was told to sign or face immediate foreclosure of the mortgage on his personal residence, which in part secured the earlier note. The loan officer had also placed new collateral as security on the November 2, 1981 note, even though Spriggins told him that the collateral was already pledged. Spriggins signed the November 2 note but

continued to point out to the bank that his notes were wrong.

Spriggins hired attorney William G. Walker of Albuquerque, New Mexico (Walker) to represent them. Mr. and Mrs. Spriggins paid him a $5,500 retainer. Walker filed a law suit on September 1, 1982, in the United States District Court, alleging fraud, breach of fiduciary duty, violations of state unfair trade practices and federal truth in lending laws. This suit against the bank demanded $1.3 million in damages as a consequence of the bank's fraudulent dealings with Spriggins. This is the law suit which is the subject of this Petition for Certiorari.

Walker took no discovery between September 1, 1982, when the suit was

filed, and January 26, 1983. On that date, Spriggins appeared for depositions in the offices of counsel for the bank, but unknown to him, his lawyer had begun negotiating a settlement with the bank.

The Spriggins had communicated to Walker on many occasions that they were opposed to a settlement of the law suit and felt their best hope was to tell their story to the judge and jury. Spriggins resisted settlement, but Walker told them that despite the $5,500 retainer Spriggins had already paid, it would cost Spriggins another $15,000 to go to court. This had not been mentioned by Walker before. Spriggins said that he would get another $15,000 from his retirement and pay Walker to go to court. Walker said if the case were postponed,

it would cost another $15,000 in legal fees, and another $15,000 if the trial were postponed again.

Walker said you better take the $8,000 the bank is offering because you can't afford to take this to court. Spriggins caved in to the pressure put on him by his attorney and said he would agree to the settlement if the bank would give him the money that day and release the lien on his property that day.

In the afternoon of January 26, 1983, Spriggins was given a note for $85,509 to sign, but no settlement papers were presented. Under the "settlement", the bank was to pay Walker another $5,500 in legal fees, bringing his total fee to $11,000. Deducting Walker's previous fee, Spriggins was to receive less than

$2,500 from the settlement, despite the fact that Walker had strong evidence that the bank had attempted to defraud Spriggins of all of his property.

The cash payment and the release of the lien was not made on January 26, 1983. That night Spriggins went back to his motel room and realized that the settlement was a sham and it deprived him of his right to go to court. The next morning he went to Walker's office and told him that there was no deal because the bank had breached their promise to give him the money and the release of the lien the day before, in exchange for the note signed by Spriggins.

On February 8, 1983, Spriggins wrote Walker, after Walker had sent him settlement papers, and told him the

settlement was unacceptable. Spriggins further said he would not sign the settlement papers submitted by Walker and the bank's lawyer because the January 26, 1983 agreement had not been complied with.

On February 24, 1983 Walker withdrew as attorney because Spriggins refused to go ahead with the settlement and told Spriggins to secure new counsel by May 7, 1983 to respond to the bank's Motion to Affirm the settlement. Spriggins, having already given Walker $5,500 had limited funds to retain competent counsel. He tried anyway and on March 7, 1983, he and his wife drove 320 miles from Hobbs to Albuquerque to try to secure alternative counsel to represent him. No attorney was willing to represent him on such

short notice. He was told to either sign the settlement agreement or he might get nothing. He had no choice but to . capitulate and sign the agreement.

Though having withdrawn as counsel, and knowing fully of Spriggins vigorous objections, Walker nonetheless signed, on March 9, 1983 a Joint Motion of Dismissal and approved an Order of Dismissal. Walker never brought his client's objections to the attention of the court. The court dismissed the action on March 9, 1983. Walker did not send Spriggins a copy of the Order of Dismissal by the U.S. District Court. Spriggins made eight monthly payments of over $1,200 under the "settlement" note, but on each payment check he said "this note is wrong".

Spriggins discovered the dismissal when he drove to Albuquerque on February 23, 1984 to examine the federal court file and on that day, he hired counsel to file a Rule 60(b) Motion to vacate the March 9, 1983 dismissal of his action. This was filed on March 8, 1984.

On February 23, 1984, Spriggins discovered upon returning to Hobbs, that the bank had sued for foreclosure of his personal residence and every other property that he owned based on the January 26, 1983 "settlement" note. That foreclosure action is now being pursued by the Federal Deposit Insurance Corporation as receiver for the now defunct bank.

The United States District Court for the District of New Mexico on May 15,

1984 refused to vacate its earlier order of dismissal. Appeal was taken to the United States Court of Appeals for the Tenth Circuit, which on November 27, 1985 affirmed the District Court ruling. The Court of Appeals denied rehearing on December 6, 1985.

## STATE JUDGMENTS

No review of a state judgment is sought.

## STATEMENT OF JURISDICTION

Federal jurisdiction is based on Federal question. The Spriggins law suit alleged violations by the bank of federal laws involving truth in lending, 15 U.S.C. Section 16Ø1 et seq.

## ARGUMENT

Under the unusual and extraordinary circumstances of this case, and in view of the outrageous conduct of Spriggins

attorney, the District Court should have exercised its sound discretion and vacated the order of dismissal. Because this case involves an order of dismissal and not an adjudication after trial on the merits, any doubt should have been resolved in favor of Spriggins motion to set aside judgment in order to carry out judicial policy that cases be decided on the merits. Moore's Federal Practice, 60-156 (1983 ed).

The law is well established that relief under Rule 60(b) may be granted based on the misconduct of plaintiff's attorney. Walker's misconduct was gross and in every way violated his obligation of loyalty to his client. He entered into a settlement agreement contrary to his client's wishes. Bradford Exchange

v. Treins Exchange, 600 F 2d 99 (7th Cir. 1979). Associates Discount Corporation v. Goldman, 524 F 2d 1051 (3rd Cir. 1975); Thomas v. Colorado Trust Deed Funds, Inc., 366 F 2d 136 (10th Cir. 1966). See ABA Code of Professional Responsibility, Canon 7. It is axiomatic that such consent must be freely given and not subject to a lawyer's manipulation and coercion.

Walker was a member of the bar and supposedly skilled in the law. He holds the highest fiduciary obligation to deal fairly with his client. This obligation was ignored by Walker, and now his client suffers and the courts have refused to intervene to protect Spriggins from the misconduct of his attorney. Walker's approach in convincing Spriggins to sign

the January 26, 1983 note amounted to unreasonable pressure and duress and misrepresentation.

Spriggins did initially sign a note but only with the understanding that an $8,000 cash payment would be made that day and that a mortgage lien would be released that day. These conditions did not occur and there was no true meeting of the minds on the settlement. No settlement documents were presented and it was only because of Walker's failure to represent Spriggins that a settlement document was ultimately signed.

Spriggins, on March 7, 1983 signed the settlement documents presented by the bank but only after attempts to secure counsel in Albuquerque to press his objections were unsuccessful. After

paying Walker $5,500, Spriggins had no business being required to try to secure another lawyer to represent him.

Even after withdrawing his representation, Walker signed a joint motion for dismissal, even though he had unilaterally terminated the attorney/client relationship on February 24, 1983. The District Court never approved his withdrawal. Walker, despite having withdrawn, continued to act as if he were Spriggins attorney, unknown to Spriggins. If Walker was his attorney, Spriggins would have insisted that his objections be presented to the court. Only after being able to find no attorney willing to enter the case did Spriggins give up hope and sign the settlement papers.

If Walker was not Spriggins attorney, then he had no authority to act. If he was, he was under an obligation to bring his clients objections to the settlement to the court's attention. Rather, Walker abandoned his client's interests. Abandoned by his attorney, Spriggins really had no alternative but to sign the settlement agreement, and there was therefore no true consent to the settlement. Only his failure to find an attorney caused him to relent.

Even a consent judgment can be overturned where one party fails to perform, as is the case here. L. M. Leathers Sons v. Goldman, 252 F. 2d 188 (6th Cir. 1958).

Justice Black said in Klapprott v.

U. S., 335 U.S. 601, at 615, that a Rule 60(b) Motion should be granted "whenever such action is appropriate to accomplish justice". It cannot be said that Spriggins received justice. As the court said in Jackson v. Washington Monthly Company, 569 F. 2d 119, 123-4 (D.C. Cir. 1977):

> Public confidence in the legal system is not enhanced when one component punishes blameless litigants for the misdoings of another component of the system: To laymen unfamiliar with the fundamentals of agency law, that only conveys the erroneous impression that lawyers act at the expense of everyone else.

The United States Court of Appeals decision herein is contrary to the ruling of the United States Supreme Court in Klapprott v. United States, 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266. The ruling is further in opposition to Tozer

v. Charles A. Krause Milling Co., 189 F 2d 242 (3rd. Cir.) 1954. Patapoff v. Vollstedt's, Inc., 267 F 2d 863 (9th Cir., 1959); Seven Elves, Inc., v. Eskanasi, 635 F 2d 396 (5th Cir., 1981). These cases create a presumption in favor of granting Rule 60(b) relief where there has been no trial on the merits, a presumption ignored by the U.S. Court of Appeals in this case.

On behalf of Mr. and Mrs. Spriggins, I respectfully pray this Court accept their Petition, and correct the tragic injustice created by the courts below. Without your intervention, Mr. and Mrs. Spriggins will lose everything including their home; whatever small gains they have made in life will be destroyed, together with their belief in our system

of justice.

Respectfully,

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# APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHNNIE C. SPRIGGINS and
MARIA SPRIGGINS, Husband
and Wife,

Plaintiffs,

vs. CIV NO. 82-0936 HB

FIRST NATIONAL BANK OF
LEA COUNTY,

Defendant.

## MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiffs' motion to vacate the Order of Dismissal entered March 9, 1983. Having considered the arguments of the parties, the authorities, and the entire record, the court concludes that the motion lacks merit and should be denied. For the purpose of ruling on this motion, the court accepts as true the following allegations of the parties.

Plaintiffs filed this suit in September, 1982 against the defendant First National Bank of Lea County alleging causes of action based on fraud, breach of fiduciary duty, the New Mexico Unfair Trade Practices Act and the federal Truth-in-Lending laws. Attorney William Walker represented the Spriggins. On January 26, 1983 the parties and their attorneys met to attempt to negotiate a settlement. An agreement was reached and subsequently reduced to writing. That same day, as part of the settlement agreement, the Spriggins signed a promissory note in the amount of $85,509.38 payable to the Bank. In turn, the Bank agreed to release its mortgage on certain property

owned by the Spriggins and to pay plaintiffs and their attorney $13,500 with $5,500 of that sum designated as attorney's fees.

The morning after the settlement conference Mr. Spriggins told Walker the amount of the promissory note was incorrect and that he would not "go through" with the settlement. Spriggins wrote Walker to the same effect on February 8, 1983. In the meantime, the Bank had submitted settlement and dismissal documents to Walker along with a draft for $13,500. The Spriggins continued their resistance to the settlement and the Bank moved to affirm settlement. On February 24, 1983 Walker moved to withdraw as counsel for plaintiffs. He wrote the Spriggins to inform them of his action, enclosing copies of his withdrawal motion and the Bank's motion to affirm settlement.

The Spriggins consulted another attorney but were unable to obtain substitute counsel. Consequently, on March 7, 1983, the Spriggins signed the Settlement Agreement to which they objected. On March 9, 1983 a Joint Motion for Dismissal and an Order of Dismissal, signed by Walker on behalf of the plaintiffs, were filed. The Bank filed the release of mortgage on March 11, 1983. Walker never informed the Spriggins that the case had been dismissed.

Plaintiffs made the payments due under the terms of the promissory note from March through November, 1983. On each check tendered in payment, however, they made a notation to the effect that the amount of the note was incorrect. Plaintiffs have not made the December, 1983, January and February, 1984 payments. On February 23, 1984 the Bank filed a complaint in State District Court to foreclose mortgages it holds on plaintiffs' property. That same day the Spriggins checked the file in this case and discovered that the action had been dismissed.

There are a number of reasons why plaintiffs are not entitled to vacation of the Order of Dismissal entered March 9, 1983. Assuming their attorney pressured them into agreeing to the settlement, nevertheless, they did agree. They entered into a verbal agreement on January 26, 1983 and on March 7, 1983, in spite of their previous objections, they signed the written settlement agreement. A judgment entered pursuant to a settlement should not be set aside simply becuase one party complains that his attorney coerced him into agreement. *Gilbert v. United States,* 479 F.2d 1267 (2d Cir. 1973).

Plaintiffs maintain that they did not realize at the time of the verbal settlement agreement that Walker was to receive $5,500 in fees from the $13,500 the Bank agreed to pay. The Spriggins had already paid Walker $5,500 in fees and believed the amount designated as attorney's fees in the agreement was to reimburse them for those fees which they had paid. The plaintiffs became aware that Walker was to receive the $5,500 from the settlement fund, in addition to the fees they had already paid him, prior to March 7th when they signed the settlement agreement. If there was no meeting of the minds on January 26 because of the Spriggins' original misconception, that defect was cured before the parties entered the written agreement.

The Spriggins are not entitled to relief from the judgment because Walker signed the Order of Dismissal after moving to withdraw and telling plaintiffs he was no longer acting as their attorney. Walker's motion to withdraw had never been acted upon, therefore, he was still counsel of record and as such was still authorized to act on plaintiffs' behalf.

Nor does the fact that Walker never sent the Spriggins notice that the case had been dismissed require vacation of the Dismissal. Even a person with little education should

realize that lawsuits end when the parties have settled and proceed to act in accordance with their agreement. The Spriggins' payment from March through November, 1983 of the monthly amounts due under the promissory note they signed pursuant to the settlement makes dubious their claim that they did not realize the case had been closed. If nothing else, those payments demonstrate a lack of due diligence on the Spriggins' part by acquiescing in the agreement while maintaining their objections thereto.

The court does not indicate any opinion as to whether the plaintiffs have a claim against their attorney, but they have presented no reason for vacation of the Order of Dismissal. The Dismissal was entered pursuant to a settlement agreement that they participated in negotiating and signed with full awareness of its terms. The court has considered each of plaintiffs' remaining arguments and finds them all without merit.

Now, Therefore,

IT IS BY THE COURT ORDERED that the plaintiffs' motion to vacate the Order of Dismissal is denied.

/s/ [Illegible]
Chief Judge

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO
MAY 15 1984
/s/ [Illegible], CLERK

## APPENDIX B

*SEPTEMBER TERM – November 27, 1985*

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable Monroe G. McKay, Circuit Judges

| | | |
|---|---|---|
| JOHNNIE C. SPRIGGINS and MARIE SPRIGGINS, Husband and Wife, | ) | |
| Plaintiffs-Appellants, | ) | |
| vs. | ) | No. 84-1820 |
| FIRST NATIONAL BANK OF LEA COUNTY, | ) | |
| Defendant-Appellee. | ) | |

This matter comes on for correction of a clerical error by which the original draft of the court's order and judgment in the captioned appeal was filed and distributed. On October 25, 1985, the panel had lodged with the clerk a revised copy of the order and judgment containing eight pages.

Upon consideration whereof, it is the order of the court that the eight page order and judgment shall be filed this date and distributed to all recipients of the erroneously filed seven page order and judgment.

It is further ordered that the seven page order and judgment filed November 8, 1985, is withdrawn.

The clerk shall notify the parties that the correctly filed order and judgment dated this date will have a direct bearing on the petition for rehearing filed with the court on November 21, 1985.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

FILED
United States Court of Appeals
Tenth Circuit
NOV 27 1985
HOWARD K. PHILLIPS
Clerk

## APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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| | | |
|---|---|---|
| JOHNNIE C. SPRIGGINS and MARIA Y. SPRIGGINS, Husband and Wife, | ) | |
| Plaintiffs/Appellants | ) | |
| v. | ) | No. 84-1820 |
| FIRST NATIONAL BANK OF LEA COUNTY, | ) | |
| Defendant/Appellee. | ) | |

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ORDER AND JUDGMENT

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Before BARRETT, DOYLE and McKAY, Circuit Judges.

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After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a), Tenth Circuit R. 10(e). The cause is therefore submitted without oral argument.

Johnnie C. and Maria C. Spriggins (Spriggins), husband and wife, appeal from a memorandum opinion and order denying their Fed. Rules Civ. Proc., Rule 60(b), 28

U.S.C.A. motion to vacate an order of dismissal. The relevant facts may be briefly summarized.

In September 1982, the Spriggins, through William Walker (Walker), their attorney, brought suit against the First National Bank of Lea County (Bank). The Spriggins' complaint alleged various causes of action predicated on fraud, breach of fiduciary duty, the New Mexico Unfair Trade Practices Act and the federal Federal Truth-in-Lending laws. Spriggins sought damages of $1.3 million.

On January 25, 1983, the Spriggins appeared pursuant to subpoena for depositions at the offices of Bank's attorneys. On January 26, 1983, at a time when depositions were in progress, the court reporter was dismissed and the parties, through counsel, began settlement negotiations. On that day a settlement was reached and as part thereof, the Spriggins executed a promissory note in favor of Bank in the amount of $85,509.38 and Bank agreed to release its mortgage held on certain property owned by the Spriggins and to pay Spriggins and their attorney (Walker) $13,500 (with $5,500 designated as attorney fees).

On the morning after the settlement was reached, Mr. Spriggins notified Walker that the amount of the note he had signed was incorrect and that he would not go through with the settlement. Prior thereto Bank had submitted settlement and dismissal documents to Walker and a check for $13,500. Thereafter the Spriggins continued to resist settlement and the Bank continued to affirm the settlement.

On February 24, 1983, Walker moved to withdraw as counsel, stating that "the attorney-client relationship had deteriorated to the point no attorney-client relationship exists." (R., Vol. I at 110.) Walker sent the Spriggins copies of his motion to withdraw and Bank's motion to af-

firm the settlement. The Spriggins then consulted with Tommy Jewell, another attorney, but were unable to obtain substitute counsel. On March 7, 1983, the Spriggins signed the settlement agreement and Jewell, who notarized Spriggins execution of the settlement, delivered the executed settlement agreement and release of all claims to Bank's attorney.

On March 9, 1983, a joint motion for dismissal and an order of dismissal were signed by Walker and Bank's attorney and filed in accordance with Section 2G (R., Vol. I at 190) of the Settlement Agreement which provided that the parties, by and through their attorneys, would cause the lawsuit to be dismissed with prejudice. On March 10, 1983, Bank signed a release of mortgage in accordance with the settlement agreement which was filed on March 11, 1983. Subsequent thereto, the Spriggins and Walker negotiated the $13,500 check they had previously received from Bank.

The Spriggins then began making monthly payments to Bank in accordance with the note they had executed in Bank's favor as part of the settlement agreement. Spriggins made timely payments from March until November 1983, at which time they stopped making payments. On February 24, 1984, and at a time when Spriggins' payments for December, 1983, and January and February, 1984, were past due, Bank filed foreclosure action in state court. That same day the Spriggins checked the case file and discovered that their prior action against Bank had been dismissed in accordance with the settlement agreement.

On March 9, 1984, after retaining new counsel, Spriggins filed their motion to vacate the order of dismissal, filed March 11, 1983. Spriggins alleged, *inter alia,* that:

Walker pressured them into signing a new note on January 26, 1983, the day of the settlement; following the settlement Walker failed to notify the court of the Spriggins' objections to the settlement; Walker did not send the Spriggins a copy of the joint motion for dismissal or the order of dismissal; Spriggins hired new counsel and reopened the case after discovering that the case had been dismissed; and that Mr. Spriggins had completed only the first half of the ninth grade.

Within its order denying the Spriggins' motion the district court found, *inter alia:* on January 26, 1983, a settlement was reached by the parties herein; on March 7, 1983, the Spriggins signed the settlement agreement to which they objected; Walker never informed the Spriggins that the case had been dismissed; and the Spriggins made timely payments on their note to Bank (executed in conjunction with the settlement) from March through November 1983. The district court specifically found:

> There are a number of reasons why plaintiffs are not entitled to vacation of the Order of Dismissal entered March 9, 1983. Assuming their attorney pressured them into agreeing to the settlement, nevertheless, they did agree. They entered into a verbal agreement on January 26, 1983 and on March 7, 1983, in spite of their previous objections, they signed the written settlement agreement. A judgment entered pursuant to a settlement should not be set aside simply because one party complaints that his attorney coerced him into agreement. *Gilbert v. United States,* 479 F.2d 1267 (2d Cir. 1973).
>
> Plaintiffs maintain that they did not realize at the time of the verbal settlement agreement that Walker was to receive $5,500 in fees from the $13,500 the Bank agreed to pay., The Spriggins

had already paid Walker $5,500 in fees and believed the amount designated as attorney's fees in the agreement was to reimburse them for those fees which they had paid. The plaintiffs became aware that Walker was to receive the $5,500 from the settlement fund, in addition to the fees they had already paid him, prior to March 7th when they signed the settlement agreement. If there was no meeting of the minds on January 26 because of the Spriggins' original misconception, that defect was cured before the parties entered the written agreement.

The Spriggins are not entitled to relief from the judgment because Walker signed the Order of Dismissal after moving to withdraw and telling plaintiffs he was no longer acting as their attorney. Walker's motion to withdraw had never been acted upon, therefore, he was still counsel of record and as such was still authorized to act on plaintiffs' behalf.

Nor does the fact that Walker never sent the Spriggins notice that the case had been dismissed require vacation of the Dismissal. Even a person with little education should realize that lawsuits end when the parties have settled and proceed to act in accordance with their agreement. The Spriggins' payment from March through November, 1983 of the monthly amounts under the promissory note they signed pursuant to the settlement makes dubious their claim that they did not realize the case had been closed. If nothing else, those payments demonstrate a lack of due diligence on the Spriggins' part by acquiescing in the agreement while maintaining their objections thereto.

R., Vol. I at 223-224.

On appeal the Spriggins contend that the district court's denial of their motion to vacate judgment pursuant to Rule 60(b) was an abuse of discretion.

Rule 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

The decision of whether to grant relief under Rule 60(b) is left to the sound discretion of the trial court, *Zimmerman v. Quinn,* 744 F.2d 81 (10th Cir. 1984); *Pierce v. Cook & Co., Inc.,* 518 F.2d 720 (10th Cir. 1975), *cert. denied,* 423 U.S. 1079 (1976); *Chief Freight Lines Co. v. Local Union No. 886,* 514 F.2d 572 (10th Cir. 1975). On appeal, the review of the district court's ruling on a Rule 60(b) motion is limited to determining whether the district court abused its discretion; the court of appeals does not review the underlying judgment. *Morris v. Adams-Millis Corporation,* 758 F.2d 1352 (10th Cir. 1985). *See also Security Mutual Casualty Company v. Century Casualty Company,* 621 F.2d 1062 (10th Cir. 1980); *Miller v. Woodmoor Corporation,* 619 F.2d 65 (10th Cir. 1980). Accordingly, a Rule 60(b) motion cannot be used as a sub-

stitute for appeal. *Morris v. Adams Millis Corporation, supra; V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979).

In the absence of reversible error, a party may not sit silently by, permit the claimed error to occur and then seek relief under Rule 60(b) if the result is considered unfavorable. *Sadowski v. Bombardier, Ltd.*, 539 F.2d 615 (7th Cir. 1976). Rule 60(b) may not be utilized to avoid the consequences of a decision which, in retrospect, is deemed unfortunate or unwise. *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792 (7th Cir. 1980); *Federal's, Inc. v. Edmonton Investment Co.*, 555 F.2d 577 (6th Cir. 1977).

Applying these standards to the facts herein, we hold that the district court's denial of Spriggins' Rule 60(b) motion did not give rise to an abuse of discretion. Following the verbal settlement agreement of January 26, 1983, which was formalized on March 7, 1983, the Spriggins executed a new note with Bank and accepted a $13,500 check from Bank made payable to them and Walker, their attorney. More importantly, we believe, the Spriggins proceeded to make timely monthly payments to Bank on the new note which was executed in accordance with the settlement agreement.

Rule 60(b) is not intended to afford relief to parties in Spriggins position who, after agreeing to a settlement, and after accepting the terms thereof, challenged the settlement, for the first time, a year after it was in force and effect. We agree with the district court's finding that "Even a person with little education should realize that lawsuits end when the parties have settled and proceed to act in accordance with their agreement."

Our holding that the district court's denial of Spriggins'

Rule 60(b) Motion did not give rise to an abuse of discretion should not be considered to be our implicit approval of the district court's statement that Spriggins' Attorney was authorized to sign the Order of Dismissal because the court had not yet acted on his motion to withdraw. Although not dispositive, we disagree with the district court's finding.

In *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136, 139 (10th Cir. 1966), we held that an attorney of record may not "compromise, settle, or consent to a final disposition of his client's case without express authority." The mere fact that an attorney is counsel of record does not amount to express authority to dismiss a case. *Associates Discount Corp. v. Goldman,* 524 F.2d 1051, 1053 (3d Cir. 1975). In *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892, 893 (10th Cir. 1975), we observed that "[w]hile there are some cases which say that a presumption exists that the attorney of record has the authority to settle his client's claim, if such a presumption exists it is rebutted easily . . . ."

AFFIRMED.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

FILED
United States Court of Appeals
Tenth Circuit
NOV 27 1985

## APPENDIX D

*SEPTEMBER TERM – December 6, 1985*

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable Monroe G. McKay, Circuit Judges.

| | | |
|---|---|---|
| JOHNNIE C. SPRIGGINS and MARIA SPRIGGINS, Husband and Wife, | ) | |
| Plaintiffs-Appellants, | ) | |
| v. | ) | No. 84-1820 |
| FIRST NATIONAL BANK OF LEA COUNTY, | ) | |
| Defendant-Appellee. | ) | |

This matter comes on for consideration of the petition for rehearing filed by appellants' in the captioned cause.

Upon consideration whereof, appellants' petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

Supreme Court, U.S.
FILED
MAR 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1440

In The

# Supreme Court of the United States

October Term, 1985

JOHNNIE C. SPRIGGINS and
MARIA Y. SPRIGGINS,

*Petitioners,*

vs.

FIRST NATIONAL BANK OF LEA COUNTY,

*Respondent.*

**ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## BRIEF IN OPPOSITION

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10 pp

## QUESTION PRESENTED

The Spriggins' Petition states the questions presented in a manner inconsistent with the facts and the opinion of the Court of Appeals. The following is a more accurate statement of the issue:

When a lawsuit is dismissed in accordance with the terms of a fully-executed settlement agreement, is the denial of a motion to set aside that dismissal, made one day short of one year after entry of the dismissal, an abuse of discretion?

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No. 85-1440

In The

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JOHNNIE C. SPRIGGINS and
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FIRST NATIONAL BANK OF LEA COUNTY,

*Respondent.*

**ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## BRIEF IN OPPOSITION

## OPINIONS BELOW

The Memorandum Opinion and Order of the District Court, not reported, appears as Appendix A of the Petition. The Order and Judgment of the Court of Appeals for the Tenth Circuit, unreported as yet, appears as Appendix C of the Petition.

## INTRODUCTION

There are three basic reasons for denying the writ. First, the Petition was not timely filed. Second, the opinion from which Petitioners seek this Court's relief does not deal with a subject the character of which falls within the purview of Rule 17, Rules of the Supreme Court. Third, the Petition lacks merit.

———o———

## REASONS FOR DENYING THE WRIT

### POINT I:

### The Petition for Certiorari was not timely filed.

The above-entitled cause was briefed and submitted for decision to the Tenth Circuit Court of Appeals on November 13, 1984. The Court of Appeals' Order and Judgment was rendered in an opinion filed on November 27, 1985. The Petition for Writ of Certiorari was not filed until Thursday, February 27, 1986, more than ninety days after the entry of the final opinion by the Court of Appeals. The period for applying for a Writ of Certiorari has not been extended by a Justice of this Court, pursuant to 28 U.S.C. Section 2101(c) and Rule 20, Rules of the Supreme Court.

Petitioners seek to come within the ninety-day limitation period by virtue of the denial of Petitioners' request for rehearing filed November 21, 1985. However, that request for rehearing was addressed to the Court of Appeals' opinion filed November 8, 1985. That opinion was withdrawn by the Court of Appeals on November 27,

1985, concurrently with the filing of its Order and Judgment on November 27, 1985. The Court of Appeals' Order denying the Request for rehearing, dated December 6, 1985, had nothing whatsoever to do with the opinion of the Court of Appeals filed November 27, 1985, and cannot toll the time for filing the Petition which ended Tuesday, February 25, 1986. Therefore, Petitioners' application for a Writ of Certiorari is out of time and should be denied. *See, Puget Sound Power & Light Co. v. County of King,* 264 U.S. 22 (1924); *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206 (1952); *see also, Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399 (1923).

**POINT II:**

**The subject matter of the Petition for Certiorari does not come within Rule 17, Rules of the Supreme Court.**

Petitioners seek to have this Court review a discretionary act of the District Court which denied Petitioners' motion for Rule 60(b) relief. Petitioners' motion to set aside the dismissal of their lawsuit pursuant to the provisions of a settlement agreement between the parties was filed one day short of the maximum one year allowed for relief under Rule 60(b) and did not deal with the merits of the underlying case. Instead, the relief sought by Plaintiffs' motion was to have the District Court set aside a dismissal of the underlying lawsuit. The dismissal had been entered pursuant to the provisions of a settlement agreement which had been fully executed, by all parties, more than one year prior to the filing of Petitioners' motion. It is, therefore, quite apparent that Petitioners do

not seek review of a decision which even approaches those which come within the purview of Rule 17, Rules of the Supreme Court.

In unanimously affirming the District Court's use of its discretionary powers in denying Petitioners' motion for Rule 60(b) relief, the Tenth Circuit Court of Appeals did not render a decision in conflict with the decision of any other Federal Court of Appeals on the same matter. Furthermore, contrary to Petitioners' specious assertion (Petition for Writ, p. 13), the Court of Appeals' decision in no way touches upon a Federal question. Rather, the only question and only issue subject to review was whether the District Court's denial of Petitioners' Rule 60(b) motion was an abuse of judicial discretion. Also, the Court of Appeals' opinion does not conflict with any state court decision nor has the Court of Appeals departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the District Court so as to call for an exercise of this Court's power of supervision. *See,* Rule 17, Rules of the Supreme Court. Instead, the Court of Appeals' decision parallels and follows the decisions of other Federal Courts of Appeal on similar matters and in similar situations. *Zimmerman v. Quinn,* 744 F.2d 81 (10th Cir. 1984); *Pierce v. Cook & Co., Inc.,* 518 F.2d 720 (10th Cir. 1975), *cert. denied,* 423 U.S. 1079 (1976); *Morris v. Adams-Millis Corporation,* 758 F.2d 1352 (10th Cir. 1985); *Sadowski v. Bombardier, Ltd.,* 539 F.2d 615 (7th Cir. 1976); *Smith v. Widman Trucking & Excavating, Inc.,* 627 F.2d 792 (7th Cir. 1980); *Federal's, Inc. v. Edmonton Investment Co.,* 555 F.2d 577 (6th Cir. 1977).

## POINT III:

**The Petition for Certiorari is utterly devoid of merit.**

The District Court carefully and thoroughly considered Petitioners' arguments and assertions, in their entirety, whether based on fact or fancy, and denied the Petitioners' motion for Rule 60(b) relief. *See,* Appendix A of the Petition for Certiorari. Thereafter, the Court of Appeals reviewed the decision of the District Court and unanimously concluded that the District Court had not abused its discretion by denying the relief sought. *See,* Appendix C to the Petition for Certiorari. As is adequately demonstrated by the opinion of the Federal District Court for the District of New Mexico and the unanimous opinion of the Tenth Circuit Court of Appeals affirming the District Court's denial of Petitioners' motion for Rule 60(b) relief, together with the cases cited therein (*see, e.g., Gilbert v. United States*, 479 F.2d 1267 (2d Cir. 1973); *Zimmerman, supra; Morris, supra; Sadowski, supra;* and *Smith, supra*), the Petition for Writ of Certiorari is utterly devoid of merit.

WHEREFORE, Respondent requests that this Court deny the Petition for Certiorari to the Tenth Circuit Court of Appeals.

Respectfully submitted,

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